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Nos. 82-969 and 82-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, *et al.*,
Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC., *et al.*,
Respondents.

EAGLE-PICHER INDUSTRIES, INC.,
Conditional Cross-Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,
Conditional Cross-Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE INSURANCE COMPANY OF NORTH AMERICA IN SUPPORT OF PETITIONS FOR CERTIORARI

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Philip Alan Froude, *et al.*,
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MOTION OF INSURANCE COMPANY OF NORTH AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR CERTIORARI

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the Insurance Company of North America ("INA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitions for certiorari. Respondent Eagle-Picher Industries has refused to give its consent to the filing of INA's brief.

As one of America's leading property and casualty insurance carriers, INA has a substantial interest in the issues now before the Court. Over the years, INA has issued numerous primary and excess liability insurance policies to companies that manufactured or sold products containing asbestos. Each of these policies provided general liability coverage to INA's insureds under fundamentally the same standard insurance contract language that is involved in this case.

INA has been a leader in responsible efforts to obtain a clear and uniform judicial determination of the asbestos insurance coverage controversy. INA filed the first declaratory judgment action seeking to clarify the obligations of an insurance company to its asbestos insureds, which led ultimately to the Sixth Circuit's decision in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981). INA was also a party to the District of Columbia Circuit's decision in *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). And INA is now involved in similar declaratory judgment actions with a number of other asbestos insureds, including Johns-Manville Corporation, GAF Corporation, Armstrong World Industries, Fibreboard Corporation, Nicolet, Inc., and Crown Cork & Seal Company.

Each of these lawsuits involves the identical question at issue here, the proper theory of insurance coverage for asbestos-related diseases under standard insurance policy language. Each of these cases involves application of general principles of insurance law to the same basic medical facts under the same contract language. Yet the courts of appeals in *Forty-Eight Insulations, Keene* and this case

have arrived at three irreconcilably inconsistent interpretations of that contract language. Unless the Court grants review to resolve this direct conflict, INA will be tied up for years — along with all of the other insurance carriers, their asbestos insureds and the courts themselves — in litigating each of the pending cases to final resolution.

In the accompanying brief, INA as *amicus curiae* presents a different perspective on the overriding importance of this Court acting now to resolve the conflict among the circuits over the asbestos insurance coverage question. INA urges that this Court cannot continue to refuse to resolve this conflict without abdicating its responsibility to guarantee the uniform and equitable administration of the laws, and to supervise the proper functioning of the federal courts in our federal system.

Because of INA's substantial interest in the issues presented by this case and its effort to address additional matters that should be brought to the Court's attention in considering the petitions for certiorari, it is respectfully requested that leave to file the accompanying brief be granted.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE INSURANCE COMPANY OF NORTH AMERICA IN SUPPORT OF PETITIONS FOR CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus curiae Insurance Company of North America ("INA") has a substantial interest in the issues presented by the pending petitions for certiorari. As discussed in detail in the attached motion, INA has issued primary and excess liability insurance policies to numerous companies that manufactured or sold products containing asbestos. As a result of the nationwide explosion in asbestos litigation,

INA has become involved in declaratory judgment actions concerning insurance coverage for asbestos-related personal injury and wrongful death claims with many of its asbestos insureds. All of these cases involve the same fundamental issue at stake here. INA's interest in a decision by this Court that would resolve the current conflict among the circuits on the asbestos insurance coverage issue is direct, immediate and urgent.

SUMMARY OF ARGUMENT

Four circuits, addressing the identical question — how standard insurance contract language provides coverage for asbestos-related claims — have come to three conflicting and irreconcilable conclusions. In the case now before this Court, the Court of Appeals for the First Circuit held (correctly, in INA's view) that insurance coverage for asbestos-related claims must be provided on a "manifestation" basis — that is, the insurance carrier on the risk at the time the asbestos-related disease "became reasonably capable of medical diagnosis" is responsible for defense and indemnification. In so holding, the First Circuit squarely rejected the decision of the Sixth Circuit in *Insurance Company of North America v. Forty-Eight Insulations* that the same policy language provides coverage on an "exposure" basis — that is, each of the carriers on the risk at any time the claimant was exposed to asbestos must pay a pro rata share of the cost of defense and indemnification, regardless of when a diagnosable asbestos-related disease may result. The First Circuit similarly rejected the outlandish rule imposed by the District of Columbia Circuit in *Keene Corporation v. Insurance Company of North America* that each of the carriers who ever provided insurance coverage to an insured, from the time of a claimant's first exposure to asbestos through and including the time

of manifestation of an asbestos-related disease, is fully responsible for the entire defense and indemnification of each and every claim.

This conflict among the circuits derives from the federal courts' disagreement over the application of basic principles of insurance law to standard policy language — not from any articulated differences in the laws of the various states. Thus, this conflict cannot be explained away as the reflection of "permissible differences" in the laws among the various states that the *Erie* doctrine requires the federal courts to respect. Indeed, the courts of appeals in *Eagle-Picher* and *Forty-Eight Insulations,* in reaching diametrically opposite interpretations of the policy language, both purported to apply Illinois law.

Review by this Court is urgently required. Even if grounded in state law, the asbestos insurance coverage controversy is one of the most important issues facing the American judicial system today. Billions of dollars of insurance coverage are potentially at stake, as well as the administration, settlement and trial of thousands of underlying asbestos claims pending in federal and state courts throughout the country. The Court's failure to resolve this conflict will ensure that each of the approximately forty actions pending between asbestos insureds and all of their insurance carriers will grind on through the court system until the last appeal is exhausted, at the expenditure of enormous public and private resources that could be better devoted to the handling of the asbestos claims themselves.

The Federal Government, too, has a substantial interest in resolution of the asbestos insurance coverage dispute, in view of its great potential liability in the underlying asbestos claims. In addition, with the filing of reorganiza-

tion petitions by Johns-Manville and several other manufacturers, the question of who should pay for the underlying asbestos claims has also become one of the critical issues affecting the U.S. bankruptcy courts. The asbestos problem has reached such grave proportions that Congress is now attempting to devise a federal legislative solution; but Congress, too, is stymied by the great uncertainty over who ought to contribute to the proposed claims fund.

For the Court to refuse to resolve this conflict simply because the contract issues may be controlled by state law would be to stand *Erie Railroad Co. v. Tompkins* on its head. The *Erie* doctrine was intended to eliminate forum shopping between the federal and state courts; the result of this Court's refusal thus far to resolve this conflict has been to sanction the most blatant forum shopping, in which even Eagle-Picher Industries, plaintiff in this case, has run off to the District of Columbia courts in an effort to take advantage of the *Keene* rule in a second action against its excess insurance carriers. Rather than engendering respect for the dominant role of state law in diversity cases, the present situation virtually guarantees that all such actions will in the future be brought in the federal courts, where plaintiffs can choose their forum solely on the basis of the particular result they seek.

Only this Court can resolve the current impasse in the courts of appeals on the asbestos insurance coverage question. It is imperative that the Court grant review if it is to fulfill its historic role of ensuring the uniform and equitable administration of the laws — state and federal — by the lower federal courts.

ARGUMENT

I. THERE IS NOW A DIRECT, THREE-WAY CONFLICT AMONG THE CIRCUITS ON THE BASIC ISSUE PRESENTED BY THIS CASE: HOW INSURANCE COVERAGE FOR ASBESTOS-RELATED CLAIMS UNDER STANDARD INSURANCE POLICY LANGUAGE SHOULD BE DETERMINED

With the decision of the court below, four circuits have now split in three different and conflicting ways on the basic issue presented by this case: how insurance coverage for asbestos-related claims under standard insurance policy language should be determined. Even before the First Circuit's decision, there was a conflict among the circuits on this important issue. In *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) (hereafter *"Forty-Eight"*), a divided panel of the Court of Appeals for the Sixth Circuit held that the standard policy language should be construed to provide coverage on an "exposure" basis — that is, each carrier on the risk during the period that a claimant was exposed to asbestos products would be responsible for its pro rata share of the cost of defending and indemnifying the claim.[1] However, in *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (hereafter *"Keene"*), the District of Columbia Circuit rejected the *Forty-Eight* approach, and held that each insurance carrier on the risk at any time from a claimant's first exposure to asbestos through and including the manifestation of his

[1] In *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981), *cert. denied sub nom. Aetna Cas. & Sur. Co. v. Porter*, 454 U.S. 1109 (1981), the Fifth Circuit adopted the holding of the Sixth Circuit in *Forty-Eight* without independent analysis.

asbestos-related disease was fully responsible for the entire cost of defending and indemnifying the claim, even if the claimant was not exposed to asbestos during much of that time. INA urged this Court to resolve the conflict, but the Court denied certiorari, 455 U.S. 1007 (1982), Justices White, Blackmun and Powell noting their dissent.

The decision of the First Circuit in this case expanded this conflict by adopting a third distinct theory of coverage. Rejecting the decisions in *Forty-Eight* and *Keene*, the court below held that the standard policy language provides coverage on a "manifestation" basis — that is, the carrier on the risk when a claimant's asbestos-related disease manifests itself has the responsibility for defending and indemnifying the claim. *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982) (hereafter *"Eagle-Picher"*). The First Circuit held that the standard policy language ties coverage to the time that an asbestos-related disease "results," 682 F.2d at 17, 19, and concluded that both the undisputed medical facts and "the common, ordinary meaning of the policy language" support the conclusion that asbestos-related diseases result at the time they become clinically evident, not at the time of exposure. *Id.* at 19.

There can be no serious question that the decision of the court below squarely conflicts with the decisions of the Sixth Circuit and D.C. Circuit in *Forty-Eight* and *Keene*. The First Circuit specifically stated that it was "unable to agree with the analysis of the policy language and the medical evidence in *Forty-Eight*." 682 F.2d at 23. While the court in *Forty-Eight* held the exposure theory applicable despite its admission that "a physician or biologist might not regard asbestosis as a disease so long as it was not diagnosable," 633 F.2d at 1218, the First Circuit found that

the same medical conclusion provided compelling support for the manifestation approach. 682 F.2d at 19.[2]

The First Circuit likewise expressly rejected the *Keene* decision, saying that "the court's primary objective in these cases should be to ascertain the intentions of the parties," not to give effect to the "*presumed* intention to maximize coverage" relied upon by the court in *Keene*. 682 F.2d at 23 (emphasis in original). While the D.C. Circuit in *Keene*, over the dissent of Judge Wald, held that an asbestos manufacturer would have no liability to pay any portion of the cost of defending or indemnifying a claim even though it may not have purchased insurance for many of the years between the claimant's first exposure and manifestation, the First Circuit in the decision below, like the Sixth Circuit in *Forty-Eight*, refused to allow the manufacturer any such windfall. *See Eagle-Picher*, 682 F.2d at 23; *Forty-Eight*, 633 F.2d at 1223-25 (holding asbestos manufacturer responsible for pro rata share of cost of defense and indemnification if not insured for some of relevant years).[3]

In short, the three federal courts of appeals have brewed a cauldron of inconsistent interpretations and obligations,

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[2]The First Circuit found "even less factual basis" for applying the exposure theory to cancers caused by asbestos, and expressly rejected the contrary holdings of both *Keene* (for "disregarding details of medical development of diseases") and *Forty-Eight* (for "relying on administrative convenience to treat mesothelioma and carcinoma under exposure theory in spite of contrary medical evidence"). 682 F.2d at 19 n.3.

[3]Respondent Eagle-Picher suggests that there is no conflict among the circuits because the various decisions can be reconciled on the ground that they maximized coverage for the insured. Brief in Opposition at 10-11. Apart from the dubious validity of "the insured always wins" as a governing legal principle, it is clear that this was not the basis for the decision of the First Circuit below. The First Circuit specifically *rejected* the *Keene* approach urged by Eagle-Picher, despite the fact that the *Keene* approach would have maximized coverage for the manufacturer. Moreover, although the

fashioning a conflict that has no basis in the fundamentally identical contract language, medical evidence and generally applicable legal principles relied upon by all three circuits. INA believes that the decision of the First Circuit in this case is the correct interpretation of the standard policy language — indeed, in INA's view, the First Circuit is the only federal court to date to have properly performed its role under *Erie* of attempting to ascertain and enforce state law, rather than disregarding the contract language and imposing its own notions of sound public policy. INA nevertheless urges the Court to grant the pending petitions for certiorari in order to resolve the intolerable conflict among the circuits that has now been created.

II. THE CONFLICT AMONG THE CIRCUITS ON THE ASBESTOS INSURANCE COVERAGE QUESTION URGENTLY REQUIRES THIS COURT'S REVIEW

A. The Mere Fact That This Is A Diversity Case Does Not Make The Necessity For Review Of This Conflict Any Less Compelling

The principal ground urged by respondent Eagle-Picher for denying the petition for certiorari, despite this conflict among the circuits, is that the governing law in these cases is state law. But, even assuming this is true, this Court has never suggested that review of diversity cases is not appropriate in the extraordinary circumstances presented here. It may well be that the Court has "exercised the greatest restraint and caution in granting certiorari in cases resting solely on diversity of citizenship." *Dick v.*

First Circuit, after concluding its analysis of the policies, pointed out that its holding is consistent with the principle of construing the policies to provide coverage, 682 F.2d at 23, it is readily apparent that the court below reached its interpretation of the policies on the basis of its detailed analysis of the policy language, medical facts and governing legal principles. *Id.* at 17-23.

New York Life Insurance Co., 359 U.S. 437, 449 (1959) (Frankfurter, J., dissenting). The basis for such restraint, however, is that ordinary diversity cases are "rarely of moment except to the parties," *id.* at 448, or involve merely "the application of a particular local doctrine." *Id.* at 458.

This restraint has no place when the Court is presented with conflicting decisions of the courts of appeals on an issue of immense nationwide importance. The Court has always recognized that it may be necessary to review the courts of appeals' determination of issues of state law in such "exceptional cases". *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).[4] Where issues of such "gravity and general importance" are presented, the Court has the same obligation to grant review in a diversity case as it does in any other.[5]

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[4]The Court's Rules indicate that the Court, in determining whether to grant the writ, will consider whether "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." Sup. Ct. R. 17.1(a). Significantly, this Rule is not limited to review of courts of appeals' decisions on matters of federal law, as other portions of the Rule are.

[5]*Dick v. New York Life Ins. Co., supra*, 359 U.S. at 448-49 (Frankfurter, J., dissenting) (certiorari power in diversity cases "to be exercised if some question of general interest, outside the limited scope of an ordinary diversity litigation" involved); *see* 21 Cong. Rec. 10222 (Sept. 19, 1890) (Remarks of Sen. Evarts) (certorari power granted in diversity cases to "guard against the occurring diversity of judgments" in the courts of appeals). As the Court held in *Meredith v. Winter Haven*, 320 U.S. 228, 237 (1943):

> "*Erie R. Co. v. Tompkins* . . . did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, the Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Nor can the existing conflict among the circuits be discounted simply because the asbestos insurance coverage cases arise under state law. To be sure, the Court has said that a "conflict among circuits is not of itself a reason for granting a writ of certiorari" in a diversity case because it "*may* be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938) (emphasis added). But that is clearly *not* the case here. To the contrary, each of the courts of appeals expressly found that there were no real differences among the laws of any of the relevant states.[6] Indeed, the courts in *Forty-Eight* and *Eagle-Picher* both stated that they were applying Illinois law, and arrived at exactly the opposite conclusions.[7]

B. Resolution Of The Conflict Over Asbestos Insurance Coverage Is Of Enormous Public Importance

1. Asbestos-Related Lawsuits Are Imposing Overwhelming Burdens On The Lower Courts, Which This Court's Decision Could Alleviate

The conflict here has searching effects far beyond the parties to the *Eagle-Picher* lawsuit, touching interests of national importance equal to any that come before this Court. Claims for personal injury or wrongful death re-

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[6]*See Forty-Eight*, 633 F.2d at 1219 (applying identical principles of Illinois and New Jersey law); *Keene*, 667 F.2d at 1041 n.10 (declining to decide whether Delaware, New York, Pennsylvania, Connecticut, Massachusetts or District of Columbia law applied, on the ground that "the basic principles governing the interpretation of insurance policies are the same in each state"); *Eagle-Picher*, 682 F.2d at 17 n.2 ("Although the basic principles of interpretation may not vary significantly from one jurisdiction to the next, we have sought to be consistent with Illinois and Ohio law").

[7]Similarly, this is not a case where the Court should decline review in deference to the expertise of the lower courts in discerning the law of the state in which they sit. *Huddleston v. Dwyer, supra*, 322

sulting from exposure to products containing asbestos constitute one of the most dramatic problems facing this country's court systems, federal and state. Johns-Manville Corporation alone has been named in over 11,000 separate lawsuits pending in federal and state courts throughout the nation, involving asbestos-related claims of nearly 17,000 claimants,[8] and new claims are flooding in at a rate of approximately 500 per month.[9] In filing for protection under the federal bankruptcy laws, Johns-Manville projected that its liability for such asbestos-related claims would ultimately exceed $2 billion, and perhaps "many times that amount."[10] Yet the surface has only been scratched. It has been estimated that as many as 13 million Americans may have been exposed to asbestos in the workplace. *Congressional Quarterly*, Oct. 23, 1982, at 2730. Given the nature of asbestos-related disease — thirty years or more can elapse between the time of first exposure and the onset of an asbestos-related disease — the courts could be swamped with such lawsuits well into the Twenty-First Century.[11]

U.S. at 237. Only the court in *Porter* purported to apply the law of a jurisdiction in which it was based (Louisiana). 641 F.2d at 1145. It did so, however, by adopting the Sixth Circuit's construction of Illinois and New Jersey law without any independent analysis. *Id.*

[8]Class Action Complaint For Estimation of Contingent Unliquidated Asbestos-Related Health Claims, at ¶ 3, *In re Johns-Manville Corp.*, Reorg. Nos. 82-B-11656 through 82-B-11676 (BRL), Adv. No. 83-5130A (Bankr. S.D.N.Y. filed Feb. 3, 1983).

[9]Affidavit in Support of Petition for Relief Under Chapter 11, at ¶ 11, *In re Johns-Manville Corp.*, Reorg. Nos. 82-B-11656 through 82-B-11676 (BRL) (Bankr. S.D.N.Y. filed Aug. 26, 1982).

[10]*Id.*

[11]A substantial percentage of the underlying asbestos cases are pending in the lower federal courts. As the Fifth Circuit noted in *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982), "there are over 3,000 asbestos plaintiffs in the Eastern District of Texas alone and between 7,500 and 10,000 asbestos cases pending in the United States District Courts around the country."

Moreover, the asbestos insurance coverage dispute presented in this case is at the center of at least 36 similar lawsuits, listed in the Appendix hereto, which are pending in federal and state courts across the United States. Each of these lawsuits is a mammoth undertaking, involving as many as fifty or more parties, forty years of insurance coverage, and claims that may total billions of dollars. These lawsuits are consuming vast amounts of the time and resources of the lower courts, the parties, and hundreds of lawyers and support personnel. The enormity of the stakes — Johns-Manville alone is seeking $5 billion in damages against its insurers — and the fact that the conflicting federal appellate decisions lend support to almost any legal position, make settlement or speedy adjudication of these disputes almost impossible.

Unless the Court steps in here to resolve the conflict, each of these cases will necessarily be litigated separately to final adjudication, a monumental squandering of public and private resources.[12] The Court's resolution of the insurance coverage controversy would free the enormous resources now devoted to the coverage litigation to be applied to resolution of the thousands of underlying asbestos claims, and expedite the administration, settlement and trial of the underlying claims by defining who is responsible for defense and indemnification.

2. There Is A Substantial Federal Interest In Resolution Of The Asbestos Insurance Coverage Dispute

There are also substantial federal interests at stake in the asbestos insurance coverage controversy. In addition to the asbestos cases' devastating impact on the dockets

[12]Each of the remaining asbestos insurance coverage actions is at a relatively early stage; none has reached a final decision in the trial court, and none is pending on appeal.

of the lower federal courts, the United States faces significant potential liability as a joint tortfeasor or indemnitor. As many as 4.5 million American workers may have been exposed to asbestos while employed by the government or government contractors as part of the Navy's massive World War II shipbuilding program.[13] Approximately half of the pending asbestos lawsuits are claims by such former shipyard workers and their families, *Congressional Quarterly*, Oct. 23, 1982, at 2731, and many of these actions name the United States as a defendant.[14] Moreover, a number of asbestos manufacturers have sought indemnification from the United States for its role as joint tortfeasor, either by way of third-party complaints in the underlying claims or by independent actions under the Federal Tort Claims Act.[15] Whatever the ultimate merit of these claims, the Government's prospective joint and several liability — and the fact that the Government is the only defendant whose ability to continue to pay these claims is unlimited — obviously give the United States a great interest in the

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[13]Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 Fordham Urban L.J. 55, 55 n.2 (1978), *citing* National Cancer Institute & National Institute of Environmental Health Sciences, *Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors* (Draft Sept. 11, 1978).

[14]*See, e.g., In re Asbestos Cases*, 514 F. Supp. 914, 916 (E.D. Va. 1981) (listing the United States as party to 246 of 333 individual claims of shipyard workers pending in that district). Indeed, the Government has reportedly already paid as much as $5.7 million as its share of a $20 million settlement of lawsuits by asbestos workers in Tyler, Texas. *Asbestos Litigation Reporter*, Oct. 26, 1979, at 990.

[15]Johns-Manville and Keene, for instance, have filed actions against the government under the Federal Tort Claims Act seeking contribution toward their liability to shipyard workers. *Johns-Manville Sales Corp. v. United States*, No. 81-4561 RFP (N.D. Cal. filed Dec. 7, 1981); *Keene Corp. v. United States*, No. 579-79C (U.S. Ct. Cl. filed Dec. 21, 1979). *See also Glover v. Johns-Manville Corp.*, 662 F.2d 225 (4th Cir. 1981) (reversing dismissal of asbestos manufacturers' third-party claims against the United States).

resolution of the dispute over its co-defendants' insurance coverage.[16]

Moreover, prompt resolution of the controversy over insurance coverage will expedite the reorganization of several major asbestos manufacturers under the federal bankruptcy laws. Johns-Manville, the free world's largest asbestos producer — and the largest company ever to seek protection under Chapter 11 of the Bankruptcy Code — has filed for reorganization in response to the avalanche of asbestos-related tort claims pending or anticipated against it, as have at least two other manufacturers.[17] The Bankruptcy Judge before whom the Manville Chapter 11 case is proceeding has stressed that resolution of the coverage dispute will have a "substantial impact upon the reorganization proceedings and particularly upon Manville's ability to implement a plan of reorganization."[18]

Finally, the magnitude of the asbestos health crisis, the overwhelming burden it has imposed on the nation's clogged judicial system, the extravagant cost of delivering compen-

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[16]Indeed, in light of the federal government's substantial interest in the outcome of the coverage controversy, the importance of resolution of the federal bankruptcy proceedings, the nationwide character of the operations of the asbestos manufacturers and their insurers, and the need for a nationally uniform resolution of the coverage issue, a substantial argument can be made that this dispute is properly governed by federal common law. *Cf. In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) (Blackmun and O'Connor, J.J., dissenting).

[17]*In re Johns-Manville Corp., supra.; In re Amatex Corp.*, Reorg. No. 82-05220K (Bankr. E.D. Pa. filed Nov. 1, 1982); *In re UNR Industries*, Reorg. Nos. 82-B-9841 through -9851 (Bankr. N.D. Ill. filed July 29, 1982).

[18]Order Granting Reargument and Rehearing, Findings of Fact and Conclusions of Law, Jan. 2, 1983, at 4, *In re Johns-Manville Corp., supra.*

sation to the victims through conventional litigation, and the devastating effect the asbestos claims have had on a major American industry, have all led Congress to consider legislative action. These efforts have intensified in the past six months in light of the Johns-Manville reorganization.[19] But legislative attempts to create a system of compensation for asbestos victims have been stymied by the dispute over who should share responsibility for funding the proposed compensation scheme.[20] While there is room for disagreement over whether a congressional solution is desirable, continued uncertainty about the asbestos manufacturers' insurance coverage makes it unattainable.

C. This Conflict Among The Circuits Poses A Unique Threat To The Balance in Federal-State Jurisdiction Protected By Erie

The conflict among the four circuits that have ruled on the asbestos insurance coverage controversy has precipitated an unparalleled threat to the equitable administration of the federal courts. A stampede of forum shopping has already begun. After the D.C. Circuit issued its extra-

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[19]*See Occupational Health Hazards Compensation Act of 1982: Legislative Hearings on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. (1982); *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. (1982); *Hearing on the Effect of Bankruptcy Cases of Several Asbestos Companies on the Compensation of Asbestos Victims Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. (1983).

[20]*See Congressional Quarterly*, Oct. 23, 1982, p. 2731. Rep. George Miller, Chairman of the House Subcommittee on Labor Standards which is preparing legislation for a federal compensation scheme for asbestos-related claims, found "that there is little chance of constructing a legislative solution" because of "the lawsuit against the insurance companies." *Oversight Hearing on the Effect of the Manville and UNR Bankruptcies, supra*, at 94-95.

ordinarily broad ruling in favor of the insured in *Keene*, parties with no colorable relationship to that jurisdiction began bringing asbestos insurance coverage lawsuits there.[21] Even respondent Eagle-Picher Industries, not satisfied with the result it got in this action against its primary insurers, has succumbed to the lure of the *Keene* decision and sued its excess carriers in the District of Columbia. *Eagle-Picher Industries, Inc. v. American Employers Insurance Co.*, No. 82-1841 (D.D.C. filed June 30, 1982). Manufacturers of toxic products other than asbestos have similarly sued their insurers in the District of Columbia to take advantage of the sweeping *Keene* rule.[22]

At the same time, the choice of legal theories available in the different circuits has encouraged litigants to file in federal court, precluding the development of state court jurisprudence on this issue. The conflict thus poses a dual

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[21]*See Union Pac. R.R. Co. v. United States Fire Ins. Co.*, No. 82-3497 (D.D.C. filed Dec. 9, 1982); *Abex Corp. v. Maryland Cas. Co.*, No. 82-2098 (D.D.C. filed July 27, 1982); *Turner & Newall PLC v. American Mut. Liab. Ins. Co.*, No. CA 82-1339 (D.D.C. filed May 14, 1982); *National Gypsum Co. v. American Motorists Ins. Co.*, No. 82-1332 (D.D.C. filed May 13, 1982); *Brinco Mining, Ltd. v. Federal Ins. Co.*, No. 82-1165 (D.D.C. filed April 27, 1982); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, No. 82-0089 (D.D.C. filed Jan. 11, 1982); *Unarco Industries v. Zurich Ins. Co.*, No. CA 5154-82 (D.C. Super. Ct. filed April 2, 1982).

[22]*See, e.g., Johnson & Johnson v. Aetna Cas. & Sur. Co.*, No. 82-1219 (D.D.C. filed May 3, 1982) (DES); *Abbott Laboratories v. Aetna Cas. & Sur. Co.*, No. 82-0940 (D.D.C. filed April 16, 1982) (DES); *Upjohn Co. v. General Accident Ins. Co.*, No. 82-1019 (D.D.C. filed April 13, 1982) (DES); *Hercules, Inc. v. Aetna Cas. & Sur. Co.*, No. 82-0854 (D.D.C. filed March 26, 1982) (Agent Orange); *Eli Lilly & Co. v. Home Ins. Co.*, No. 82-0669 (D.D.C. filed March 9, 1982) (DES); *E.R. Squibb & Sons v. American Motorists Ins. Co.*, No. 82-0740 (D.D.C. filed Mar. 15, 1982) (DES). Squibb filed in the District of Columbia despite the fact it had previously prevailed on a manifestation basis in a DES coverage action against one of its insurers in the New York state courts. *See American Motorists Ins. Co. v. E.R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978).

threat to the constitutional and jurisprudential values endorsed by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). It has caused precisely the evils that *Erie* sought to eliminate: a run of forum shopping, and a serious federal encroachment on state jurisdiction. The conflict among the circuits on the asbestos insurance coverage issue is purely federal, arising despite the insistence of each of the courts of appeals that there are no differences in applicable state law among all the relevant jurisdictions. It exists "solely because of the fortuity that there is diversity of citizenship between the litigants," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980), and it can be resolved only by this Court. In these circumstances, the Court's exercise of its "general power to supervise the administration of justice in the federal courts" is urgently required.[23]

D. This Court's Review Is Essential In Order To Accelerate Resolution Of The Asbestos Coverage Dispute

This Court should not shy from stepping in where it is so badly needed. The Court "has not hesitated to decide questions of state law when necessary for the disposition of a case . . . [e]ven though our decisions could not finally settle the questions of state law involved . . . ." *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943). This Court regularly resolves conflicts between the circuits on matters of federal statutory law, notwithstanding the fact that the Court's decisions can be — and often are — effectively overruled by

[23] *Western Pac. R.R. Case*, 345 U.S. 247, 260 (1953); *see also Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring); Sup. Ct. R. 17.1(a).

Congress.[24] It is similarly essential that the Court resolve the present conflict on the asbestos insurance coverage issue, despite the fact that the ultimate power to determine the issue may rest with the state courts.

Nothing can detract from the profound influence that a decision by this Court would have in reaching an expeditious resolution of the nationwide asbestos insurance dispute. Any federal court deciding how liability insurance contracts cover asbestos-related disease would be hard pressed to reject this Court's decision in the absence of reason to believe that the law of the particular state governing the dispute before it differed in some significant respect.[25] Many state courts, cognizant of the desirability of reaching a uniform adjudication of the issue, would also find the reasoning and analysis of this Court's opinion persuasive; they now have only the disarray in the federal circuits to look to for guidance. Finally, this Court's ruling would create a powerful incentive for settlement of the pending coverage disputes. Many parties would wel-

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[24]*See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (the Court "granted certiorari . . . to resolve a conflict among the Courts of Appeals" over the proper interpretation of § 4 of the Clayton Act, *id.* at 728, even while noting that "[s]hould Congress disagree with this result, it may, of course, amend the section to change it." *Id.* at 733-34 n.14).

[25]Federal courts sitting in diversity, and conscientiously applying the law of a particular state, have long regarded Supreme Court decisions on point as influential. *See, e.g., Fischer v. Excess Ins. Co.*, 115 F.2d 755, 757 (8th Cir. 1940) (although relevant Supreme Court "case is not controlling on a question of Iowa law . . . it involves nothing but the application of a rule universally recognized" for the construction of written contracts and should therefore be followed).

come and abide by a Supreme Court opinion that promised to bring direction and consistency to the present confusion; other parties would find the momentum that the opinion would unleash difficult to resist.

The potent impact that a Supreme Court determination of the question presented would have, combined with the overriding practical importance and federal dimensions of that question, make the case for granting certiorari compelling. The extraordinary conflict among the circuits; the unprecedented scope of the asbestos health problem; the effect on the nation's courts of the personal injury lawsuits, insurance coverage litigation and mammoth bankruptcy proceedings that the problem has spawned; the inability of Congress to act prior to resolution of the coverage question; and the unique threat that continuation of the conflict among the circuits poses to the principles embodied in *Erie;* all these facts make clear that "the controversy touches basic interests of federalism." *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 n.6 (1972).

The federal court system should, and does, provide "remedies for the frictions which the system creates." *Cory v. White,* 102 S. Ct. 2325, 2335 (1982) (Powell, J., dissenting). In this case, the only remedy is this Court's unique ability and fundamental responsibility to exercise its supervisory power over the federal courts and resolve the existing conflict among the circuits.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* Insurance Company of North America respectfully requests that the Petitions for Writ of Certiorari be granted.

Dated: February 25, 1983

Respectfully submitted,

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APPENDIX

LIST OF PENDING ASBESTOS INSURANCE COVERAGE CASES

1. *Abex Corp. v. Maryland Cas. Co.*, No. 82-2098 (D.D.C. filed July 27, 1982).
2. *A C and R Insulation Co. v. Fireman's Fund Ins. Co.*, No. 350-81 (D.C. Super. Ct. filed Jan. 12, 1981).
3. *ACandS Inc. v. Aetna Cas. & Sur. Co.*, No. 80-1341 (E.D. Pa. filed April 4, 1980).
4. *American Motorists Ins. Co. v. Phillip Carey Corp.*, No. 79-0518 (S.D.N.Y filed Jan. 31, 1979).
5. *American Mutual Liab. Ins. Co. v. Eastern Refractories Co.*, No. 80-3768 (Mass. Super. Ct., Middlesex Div., filed July 17, 1980).
6. *American Universal Ins. Co. v. Amatex Corp.*, No. C 328207 (Cal. Super. Ct., Los Angeles Co., filed June 27, 1980).
7. *Armstrong Cork Co. v. Aetna Cas. & Sur. Co.*, No. C 315367 (Cal. Super. Ct., Los Angeles Co., filed March 6, 1980).
8. *Asten Group v. Commerce & Industry Ins. Co.*, No. 58-19 (Pa. C.P., Philadelphia Co., filed July 15, 1980).
9. *Celotex Corp. v. Aetna Cas. & Sur. Co.*, No. 79-5885 (Fla. Cir Ct., Hillsborough Co., filed May 16, 1979).
10. *Combustion Engineering v. Insurance Company of North America*, No. N-28204 (Tenn. Cir. Ct., Hamilton Co., filed July 19, 1982).

11. *Commercial Union Ins. Co. v. Johns-Manville Corp.*, No. 80-306-N (Mass. Super. Ct., Suffolk Co., filed Jan. 4, 1980), removed to D. Mass. (Feb. 11, 1980), removed to Bankr. D. Mass. (Dec. 22, 1982).

12. *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2929 (E.D. Pa. filed May 21, 1981).

13. *Commercial Union Ins. Co. v. Sepco Corp.*, No. 81-769 (E.D. La. filed Feb. 24, 1981), transferred to N.D. Ala., No. 81G1215 (Aug. 7, 1981).

14. *Crown Cork & Seal Co. v. Aetna Cas. & Sur. Co.*, No. 1292 (Pa. C.P., Philadelphia Co., filed Sept. 12, 1978).

15. *Eagle-Picher Industries v. American Employers Ins. Co.*, No. 82-1841 (D.D.C. filed June 30, 1982).

16. *Eagle-Picher Industries v. Liberty Mutual Ins. Co.*, 523 F.Supp. 110 (D. Mass. 1981), *aff'd as modified*, 682 F.2d 12 (1st Cir. 1982), *pet. for cert. filed*, Nov. 24, 1982 (No. 82-869).

17. *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, No. 753885 (Cal. Super. Ct., San Francisco Co., filed May 29, 1979).

18. *GAF Corp. v. Insurance Company of North America*, No. C 286217 (Cal. Super. Ct., Los Angeles Co., filed May 31, 1979).

19. *Hartford Accident & Indem. Co. v. Porter Hayden Co.*, No. 82-202807 (Md. Super. Ct., Baltimore City, filed July 21, 1982).

20. *Home Ins. Co. v. Unarco Industries*, No. 79L 17246 (Ill. Cir. Ct., Cook Co., filed Aug. 7, 1979) (and six consolidated actions).

21. *Insurance Company of North America v. Nicolet, Inc.*, No. 77-971995 (Ohio C.P., Cuyahoga Co., filed July 6, 1977).

22. *J. H. France Refractories Co. v. Allstate Ins. Co.*, No. 81-3939 (Pa. C.P., Philadelphia Co., filed Feb. 24, 1981).

23. *Johns-Manville Corp. v. Home Ins. Co.*, No. 765226 (Cal. Super. Ct., San Francisco Co., filed May 31, 1980).

24. *Keene Corp. v. Insurance Company of North America*, 513 F.Supp. 47 (D.D.C. 1981), *rev'd*, 667 F.2d 1034 (D.C. Cir. 1981), *remanded without further opinion*, 672 F.2d 895 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

25. *Keene Corp. v. Insurance Company of North America*, No. 3152-82 (D.C. Super. Ct. filed March 8, 1982), *dismissed*, Nov. 22, 1982, *appeal pending*, No. 83-4 (D.C. Ct. App.)

26. *Keene Corp. v. Aetna Cas. & Sur. Co.*, No. 82-2020 (D.D.C. filed July 21, 1982), *dismissed*, Oct. 27, 1982, *appeal pending*, Nos. 83-1010, 83-1068, 83-1069 (D.C. Cir).

27. *Keene Corp. v. Aetna Cas. & Sur. Co.*, No. 13471-82 (D.C. Super. Ct. filed Aug. 18, 1982).

28. *Liberty Mutual Ins. Co. v. Armstrong Cork Co.*, No. 80-429-G (D. Mass. filed March 7, 1980).

29. *National Gypsum Co. v. American Motorists Ins. Co.*, No. 82-1332 (D.D.C. filed May 13, 1982).

30. *Nicolet, Inc. v. Insurance Company of North America*, No. C 398943 (Cal. Super. Ct., Los Angeles Co., filed Feb. 2, 1982).

31. *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, No. 82-0089 (D.D.C. filed Jan. 11, 1982).

32. *Standard Asbestos Mfg. & Insulating Co. v. Royal Indem. Ins. Co.*, No. CV 80-14909 (Mo. Cir. Ct., Jackson Co., filed July 13, 1979).

33. *Transamerica Ins. Co. v. GAF Corp.*, No. CA 79-811-A (E.D. Va. filed Sept. 24, 1979).

34. *Turner & Newall PLC v. American Mut. Liab. Ins. Co.*, No. 82-1339 (D.D.C. filed May 14, 1982).

35. *Unarco Industries v. Zurich Ins. Co.*, No. CA 5154-82 (D.C. Super. Ct. filed April 2, 1982).

36. *Union Pacific R.R. Co. v. United States Fire Ins. Co.*, No. 82-3497 (D.D.C. filed Dec. 9, 1982).

37. *Zurich Ins. Co. v. Raybestos Manhattan, Inc.*, No. 78-L-8760 (Ill. Cir. Ct., Cook Co., filed May 18, 1978).